IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 667 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

KOLI JAGDISH @ HAKUDO LAKHA BHAI

Versus

STATE OF GUJARAT

Appearance:

MR RK JOSHI for appellant.

MR KC SHAH, APP for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.L.DAVE

Date of decision: 22/09/98

ORAL JUDGEMENT (Per A.L. Dave, J.)

1. The present appeal arises out of a judgment and order passed by the learned Additional Sessions Judge,

Bhavnagar, in Sessions Case No.161 of 1992 before him, wherein the present respondent came to be convicted for murder of one Bhopabhai Lakhabhai and sentenced to life imprisonment along with fine of Rs.1000/- and was directed to undergo further rigorous imprisonment for six months in the event of default in payment of fine.

2. The unfortunate incident occurred on 5th May, 1992 at about 18.30 hours near railway track in the locality known as Rasala Camp of the city of Bhavnagar. The accused Koli Jagdish alias Hakudo Lakhabhai has an elder brother named Chitharbhai, who is married to Aartiben. As per prosecution, the accused suspected illicit relation between Aartiben and deceased Bhopabhai. In that regard, at about 6.30 P.M. on the 5th May, 1992, the two persons had altercation which was followed by a scuffle. The scuffle was witnessed by a young girl named Sita, witness Kanubhai and another witness Najabhai, who happens to be cousin of the deceased-Bhopabhai. During the course of the scuffle, the accused brought out a knife and gave a blow just below the neck portion on the back side of the deceased. When the blow was given, the deceased was in a bent position. The injury that was caused was so grievous that it caused death of Bhopabhai. The knife penetrated through the lungs and also cut a major vessel resulting into profused bleeding and ultimate death of the deceased. Eye-witness Sita informed Bhaskarbhai Dhanjibhai, who, in turn, lodged the information with the police at about 21.00 hours and the offence was registered at about 21.15 hours on the same day. In the meantime, police was informed at about 20.30 hours by the hospital authorities. Following the registration of the offence, the matter was investigated upon and charge sheet filed. The matter was sent to the Sessions Court by the learned Chief Judicial Magistrate, Bhavnagar, for trial as the offence was exclusively triable by a Court of Sessions. At the trial, the accused pleaded not guilty and after considering the evidence on record, the learned Sessions Judge came to a conclusion that the prosecution was able to prove the charge of murder against the accused-appellant and passed the sentence of conviction and imprisonment for life against the accused on 22nd April, 1993, which is the subject matter of challenge in this appeal.

3. We have heard Mr. R.K. Joshi, learned advocate appearing for the appellant-accused. He submits that the three eye-witnesses have, in substance, supported the factum of the accused assailing the deceased with a knife and that injury resulting into the death of the deceased. Mr. Joshi's case is that the place of incident is near

to the house of the accused and his brother as compared to the house of the deceased. The eye-witnesses did not speak anything about the origin or genesis of the incident. They straightaway come with a story that they saw the deceased and the accused engrossed in a scuffle. Nobody speaks anything about how the incident started. Another aspect that Mr. Joshi has brought to our notice is that, according to the witnesses, the deceased had bent down for picking up a stone. This gave reasonable apprehension of assault by him with the help of the stone in the mind of the accused and it is only then that the accused has drawn the knife and has given a single blow. Till then, the accused has not drawn his knife and, subsequently also, the accused has not given any further blows. Mr. Joshi, therefore, urged that the trial Court was in error in convicting the accused for murder as no intention could have been attributed to the accused for committing murder of the deceased. There does not seem to be any premeditation for commission of crime nor is there any criminal antecedent of the accused. Mr. Joshi, therefore, submitted that the accused, on plain reading of the evidence, appears to have acted in exercise of his right of private defence. The trial Court has overlooked this aspect and has convicted the accused for murder of deceased Bhopabhai and the impugned judgment and order, therefore, needs to be reviewed by this Court.

4. Mr. K.C. Shah, learned Additional Public Prosecutor, has opposed this appeal. Mr. Shah submitted that the witnesses do not support the defence version of right of private defence. Why the accused should have carried weapon with him? The Panchnama is silent about the presence of any stone and the deposition of witnesses is also silent about the size of the stone. Mr. Shah, therefore, urged that the learned Additional Sessions Judge has correctly come to a conclusion and there is no need for any interference in the impugned judgment and, therefore, the appeal may be dismissed.

5. During the course of arguments by both the sides, we have been taken through the relevant and material portions of the evidence on record.

6. Considering the evidence of girl Sita, Ex.19, witness Kanu, Ex.23 and witness Naja, Ex.24, the picture that emerges is that they are all eye-witnesses. They all have stood the test of cross-examination about the incident and have remained unshaken. None of these witnesses have any enmity against the accused. The only aspect that requires consideration is that, witness-Naja

is the cousin of the deceased. But that by itself cannot affect his deposition when it is supported and corroborated by depositions of other two eye-witnesses.

6.1 Added to the above aspects is the fact that the weapon which is alleged to have been used by the accused in commission of the crime was discovered by the accused from below the roof tiles of his own house in presence of Panch witnesses. The Panchnama, Ex.32 is proved through depositions of witness-Vikramsinh, exhibited at Ex.31. The said knife carried blood stains and the F.S.L. report Ex.15 indicates that it was the blood group of the deceased, namely, human blood group "A", which was found on the knife. All these aspects collectively go to indicate that the accused Koli Jagdish alias Hakudo Lakhabhai caused fatal injury to the deceased-Bhopa at the relevant time.

7. The question that we are required to address as posed on behalf of the appellant, is that whether the injury caused by the accused, which ultimately resulted into death of the deceased, can be considered as a culpable homicide amounting to murder. To put it differently, whether the accused had intentionally caused death of the deceased or whether the accused was acting in exercise of his right of private defence and, if so, whether he had appropriately and justly exercised the powers of right of private defence or whether he had exceeded the same.

8. It is evident from the evidence of eye-witnesses, Sita, Kanu and Naja that none of them throw any light as to the origin of the incident. All of them say that they saw the two persons quarrelling and having a scuffle. How the incident started is not coming on record. This is to be viewed in the backdrop of the fact that the place of incident is near the house of the accused and his brother. House of the deceased was away from the place of the incident. It is the prosecution case that the deceased had illicit relation with the sister-in-law (elder brother's wife) of the accused, which was not liked by the accused which, ultimately, resulted into the altercation, scuffle and the fatal injury to the deceased. The possibility, therefore, of the deceased being the aggressor or the person initiating the quarrel cannot be ruled out.

9. Another aspect that requires to be considered in the perspective of the argument advanced on behalf of the appellant is that witness-Kanu in his deposition Ex.23 categorically states that the accused and the deceased

were engrossed in a scuffle when deceased-Bhopa bent down to pick up a stone and, at that point of time, the accused drew his knife and gave a blow in the back of the deceased. The deceased, therefore, fell down. Eye-witness Naja in his deposition at Ex.24 states that the deceased and the accused were engaged in a scuffle. The deceased bent down and, at that time, the accused drew his knife and gave a blow in the back of the deceased. Thus, it transpires that during the course of the scuffle, the deceased probably attempted to pick up a stone lying at the place of the incident for using it as a weapon against the accused. Of course, it has to be noted that witness-Sita, when confronted with the suggestion that deceased-Bhopa had bent down to pick up a stone, has denied that suggestion. But taking an overall view of the depositions of the eye-witnesses, the possibility of deceased having bent down to pick up a stone for using it against the accused cannot be ruled out.

10. It, therefore, appears to be justified when it is argued that the accused inflicted the knife blow by way of exercise of right of private defence, apprehending assault by the deceased with the help of the stone. Unfortunately, the record is silent about the presence of the stone at the place of the incident (the Panchnama of place of offence is silent about it), so also the size of the stone. But the possibility of presence of stone and the deceased bending down to pick up the stone is indicated from the depositions of the eye-witnesses and the benefit thereof has to reach the accused.

11. However, when no suggestion is made during the cross-examination about the size of the stone and no evidence is brought about the size of the stone along with the fact that the accused has not availed of the opportunity of bringing on record the size of the stone in his statement under Section 313 of the Code of Criminal Procedure, it is difficult to accept that the situation was such as would cause such an apprehension in mind of the accused that, if he does not react so heavily, it might cause his death. If the stone was big enough as would be sufficient to cause death of a person, its presence can necessarily be presumed to have been noted in the Panchnama. While exercising the right of private defence, true it is, that golden scales can never be employed in service, but the apprehension has to be of a reasonable and prudent man and must flow from the circumstances and situation existing at that time. Taking an overall view of the evidence on record and legal propositions, we are of a view that the accused did

have a reasonable apprehension of being assaulted by the deceased with the help of a stone. It did give the accused a right to exercise his right of private defence. But the apprehension could not have been such that, if the accused did not react in the way in which he reacted, his death would ensue. The accused has, therefore, in our view, exceeded his right of private defence. He could have legitimately used force just enough to prevent the deceased from using that stone against him, but there was no need for him to have drawn the knife and inflicted the blow with such a force that, although given at the back of the body below the neck, it has penetrated through the lungs and has cut a major vessel.

12. We are supported in our view by the decision of the Apex Court in the case of Dominick Varkey v. State of Kerala, 1971 Criminal Law Journal 1057 and the decision of a Division Bench of this Court in the case of Baburao Vithal Survade v. State of Gujarat, as reported in 1972 Criminal Law Journal 1574.

13. In view of the above discussion, it is amply clear that the accused has caused death of the deceased and is, therefore, responsible for culpable homicide, but it is just short of murder and, therefore, he would be liable to be punished under Section 304 Part II of Indian Penal Code, in light of the fact that that nature of injury inflicted by him was such that it cannot be said that he did not have the knowledge that his act is likely to cause death of the deceased. The force used by him while giving the blow, the weapon used by him, the size of the weapon and the seat of the injury, all clearly indicate that a man of prudence could have known that this injury might cause death of a person. The accused, therefore, would be liable to be punished under Section 304 Part II of Indian Penal Code and not under Section 302 of Indian Penal Code, as has been held by the trial Court. This is where the trial Court has callen in error. The appeal, therefore, needs to be partly allowed to that extent.

14. We have heard learned advocate Mr. R.K. Joshi and Mr. K.C. Shah, learned Additional Public Prosecutor on question of sentence.

15. Mr. Joshi contended that the accused is in jail for nearly six years. He has an ailing mother aged about 65 years and an elder brother-Chitharbhai, who is suffering from tuberculosis. The accused hails from economically down trodden strata of society, engaged in work of house painting and mercy may be shown on him.

When the incident occurred, he was aged only 22 years. Mr. Joshi submitted that a young man's future may be sympathetically considered by this Court while inflicting punishment.

15.1 On the other hand, Mr. Shah has submitted that the deceased was also an young man, serving in a bank and was the bread earner for the family. The family must not suffer and deterrent punishment may be inflicted, so that the society takes a lesson from such incidents.

16. In our considered view, keeping all these aspects special to this case in our mind, we feel that ends of justice would be met, if the accused is ordered to undergo rigorous imprisonment for seven years besides payment of penalty of Rs.1000/-, which is already imposed by the trial Court. The accused shall be given benefit of set off for the sentence already undergone by him.

17. The appeal, therefore, stands partly allowed. The judgment and order of the learned Additional Sessions Judge, Bhavnagar in Sessions Case No.161 of 1992, dated 22nd April, 1993, stands altered accordingly.

[J.N. BHATT, J.]

[A.L. DAVE, J.]

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